

DOCKET FILE COPY ORIGINAL

RECEIVED

APR 19 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL

In the Matter of)
)
Tariff Filing Requirements for) CC Docket No. 93-36
Nondominant Common Carriers)
)

Reply Comments of Avis Rent A Car System, Inc.

Avis Rent A Car System, Inc. ("Avis"), through its attorneys, hereby submits its reply comments in the above-referenced proceeding.

Noting the Commission's long recognition that nondominant resellers warrant special regulatory flexibility,^{1/} Avis' comments urged the Commission to ensure that the tariff filing requirements imposed on such carriers are as unintrusive as possible.^{2/} Avis proposed that, at a minimum, the Commission amend Section 61.74 of the Rules to permit nondominant resellers to cross-reference the rates, terms and conditions of their underlying facility carrier's tariff.^{3/} Avis argued that since

^{1/} For example, resellers of basic domestic terrestrial communications services were the first nondominant carriers that the Commission awarded permissive detariffing. Competitive Carrier Second Report and Order, 91 FCC 2d 59, 73 (1982).

^{2/} Comments of Avis at 3-5.

^{3/} Id. at 5-9. Avis also proposed that such cross-referencing be used to establish a maximum or range of rates for the reseller. Id. at 5-6. In addition, Avis proposed that the Commission allow nondominant resellers to operate pursuant to individual customer contracts to the maximum extent possible. Id. at 5. Avis also proposed that, if the Commission declined to adopt these proposals, it should grandfather reseller tariffs that include these provisions and already have been allowed to go
(continued...)

many nondominant resellers typically reoffer their underlying carrier's services under rates, terms, and conditions virtually identical to those offered in that carrier's tariff, requiring resellers to file more than a cross-reference to the tariff would be unnecessary and burdensome.^{4/}

Of the commenters that discussed whether nondominant carriers should be allowed to cross-reference tariffs, virtually all supported such flexibility.^{5/} This support is significant given that these parties independently proposed affording nondominant carriers this flexibility despite the failure of the Notice to do so. Indeed, it is interesting to note that the suggestion to allowing cross-referencing was one of the few additional proposals advanced by commenters.

Only one commenter appeared to oppose the ability of nondominant carriers to cross-reference tariffs.^{6/} The Robinson Comments propose that the FCC not permit carriers to cross-reference the tariffed rates charged by their competitors. Those comments argue that cross-referencing restricts price

^{3/} (...continued)
into effect. Id. at 9-10. Avis hereby also supports proposals made by several commenters that the Commission reduce the fee that nondominant carriers must pay to file tariffs with the FCC. See, e.g., Comments of LinkUSA at 5-6.

^{4/} Comments of Avis at 7.

^{5/} Comments of BellSouth at 11, 12-13, 14. Comments of

competition, inhibits price cutting, and could lead to horizontal price fixing and/or price collusion.^{7/}

As a threshold matter, the Robinson Comments do not specifically mention nondominant resellers and the analysis contained therein would not seem to apply to resellers. Indeed, it is difficult to understand how a nondominant carrier's cross-reference to its underlying carrier's tariff could give rise to the antitrust concerns expressed in the Robinson Comments. The concerns with restricting price competition via cross-referencing assume that, absent cross-referencing, parties can independently set their prices and engage in active price competition. However, nondominant resellers do not truly enjoy this ability. The reality of resale is that the underlying carrier typically controls the rates, terms, and conditions under which the resale service is offered.^{8/} Thus, regardless of whether the Commission

^{7/} The Robinson Comments also propose that the FCC require existing tariffs that cross-reference a competitor's price be withdrawn and refiled without the cross-reference. Avis strongly opposes this proposal. If the FCC does not adopt cross-referencing in its new rules, existing resellers' tariffs that cross-reference the underlying carrier's tariff should be grandfathered. See Comments of Avis at 9-10. Forcing nondominant carriers, such as Avis, whose tariffs did not lead to the filing of Petitions To Reject or To Suspend and Investigate, to file new tariffs would add a new and unnecessary layer of confusion at a particularly tumultuous time for such carriers and their customers. Id. Moreover, by diverting resellers' attentions to this burdensome, administrative paperwork matter, the FCC will merely inhibit such carriers' marketing and resale efforts. Id.

^{8/} For example, the term of resold volume or term discounts, renewal options, and the services available essentially are within the control of the underlying facilities carrier, not the reseller.

permits resellers to cross-reference their underlying carrier's tariff, resellers must peg their rates to those of the underlying carriers. Cross-referencing does not affect that necessity, it merely makes it less burdensome for resellers to play their valuable role in the marketplace.^{9/2}

As a consequence, the antitrust concerns expressed in the Robinson Comments do not appear to be applicable to allowing nondominant resellers to cross-reference the tariffs of their underlying carriers.^{10/}

Indeed, there appears to be no legal impediment to allowing resellers to cross-reference their underlying carrier's tariff. First, nothing in the Communications Act in general, nor Section 203 in particular prohibits cross-referencing. Section 203 only requires that each carrier's rates be filed with the Commission;

^{9/} Although it is not yet clear how complex or voluminous the tariff filings of underlying carriers other than AT&T will be, forcing a reseller to replicate even a portion of the hundreds of pages of rate structures, volume levels, and commitment requirements contained in AT&T's Tariff 12, which Avis resells, would be extremely burdensome and arguably in conflict with the Commission's long standing policy of encouraging resale.

The existence of resellers in the market, even though their prices are pegged to facilities carriers, fosters greater competition and acts to keep facilities carriers rates reasonable. See, e.g., Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627, 2630 (1990) (the existence and strength of resellers has greatly enhanced long distance competition by creating steady, strong pressure toward cost-based pricing at all levels of the long distance market and reducing entry barriers, particularly capital requirements).

^{10/} Assuming such theoretical antitrust concerns are valid, which is not clear, they would seem more logically to apply to facilities carriers cross-referencing other facilities carriers tariffs.

it does not prevent carriers from meeting that obligation by reference to another filed tariff. Similarly, Maislin and Regular Common Carrier Conference merely require that charges for common carrier service be published in, or readily ascertainable from, the carriers' filings with agency;^{11/} the "readily ascertainable" standard would appear to sanction tariffs that cross-reference the rates of another publicly-filed tariff.^{12/} Second, if the FCC permits nondominant carriers to cross-reference their underlying carrier's tariff, it can ensure that the rates of nondominant resellers are just and reasonable under Section 201(b) through its regulation the underlying carrier's rates.^{13/} Indeed, the FCC has found that there is little risk

^{11/} 793 F.2d 376, 380 (D.C. Cir. 1986); 793 F.2d 376, 380 (D.C. Cir. 1986); see also Comments of AT&T at 6, 7.

^{12/} In addition, although federal courts have never ruled on legality of cross-referenced tariffs, several decisions have implicitly acknowledged their validity by interpreting, rather than challenging, tariffed rates that were determined by cross-reference to another tariff. See, e.g., MCI v. FCC, 822 F.2d 80, 83 (D.C. Cir. 1987); RCA Global Communications v. U.S. Transmission Systems, 717 F.2d 1429, 1431 (D.C. Cir. 1983); Baggett Transportation Co. v. U.S., 319 F.2d 864, 866 (Ct. Cl. July 12, 1963); Empire Refining Co. v. Davis, 6 F.2d 305, 306 (E.D. OK 1925); Alabama Great Southern R.C. v. McFadden Bros..

that resellers will charge unjust or unreasonable rates.^{14/} And third, there is ample FCC precedent for permitting tariff cross-referencing where, as with nondominant resellers, the material to be referenced is voluminous or complex or for carriers whose provision of service may warrant some regulatory flexibility.^{15/}

^{14/} See, e.g., Competitive Carrier Second Report Reconsideration at n. 13 (noting that where the underlying carrier from whom the reseller obtains transmission capacity remains subject to regulation, the ability of resellers to fix unreasonably high rates is constrained.) Moreover, the complaint process of Section 208 remains available if market aberrations should occur.

^{15/} See, e.g., Private Line Rate Structure and Volume Discount Practice, Report and Order, 97 FCC 2d 923 (1984) at para. 28; AT&T, Memorandum Opinion and Order, 69 FCC 2d 1672 (1978) at para. 23; Access Filings for Small Telephone Companies, Memorandum Opinion and Order, 3 FCC Rcd. 7173 (1988); Telefonica Larga Distancia de Puerto Rico, Order, 7 FCC Rcd 4423 (1992) at n.2; AT&T, Order, 89 FCC 2d 369, 374 (1982), aff'd, MCI v. FCC, 822 F.2d 80 (D.C. Cir. 1987).

CONCLUSION

As illustrated above, the record in this proceeding supports Avis' proposal that the Commission amend Section 61.74 of the Rules to permit nondominant resellers to cross-reference the rates, terms and conditions of the underlying carrier's tariff. This flexibility will ensure that the tariff filing requirements imposed on nondominant resellers are as unintrusive as possible and thus will advance the Notice's goal of streamlining, to the maximum extent possible, the tariff obligations on nondominant carriers.

Respectfully submitted,

Avis Rent A Car System, Inc.

A handwritten signature in dark ink, appearing to read 'Albert Halprin', is written over a horizontal line.

Albert Halprin
Melanie Haratunian
Halprin, Temple & Goodman
Suite 1020, East Tower
1301 K Street, N.W.
Washington, D.C. 20005
(202) 371-9100

April 19, 1993

Certificate of Service

I hereby certify that, on this 19th day of April, 1993, the foregoing Reply Comments of Avis Rent A Car System, Inc. were served by first-class mail, postage prepaid, upon the following parties:

Michael F. Altschul
W.D. & H.O. Wills

Leon M. Kestenbaum
Michael D. Kestenbaum

Cindy Z. Schonhaut
Vice President, Government
Affairs
MFS Commun. Company, Inc.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 944-4209

Andrew D. Lipman
Jonathan E. Canis
Swidler & Berlin, Chartered
Attys for MFS Communications
Co., Inc.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 944-4300

Michael D. Lowe
Lawrence W. Katz
Edward D. Young, III
The Bell Atlantic Telephone
Companies
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-6580

Philip Otero
Alexander P. Humphrey
GE American Communications,
Inc.
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

James P. Tuthill
John W. Bogy
Pacific Bell & Nevada Bell
140 New Montgomery St.
Room 1530-A
San Francisco, CA 94105
Attys for Tele-Communications

Joe Alexander
Two-Way Radio Communications
Co. of Kansas, Inc.
41 Western Avenue
P. O. Box 1066
Liberal, Kansas 67905

Terry C. Jenks
Patricia A. Mahoney
Fletcher Heald & Hildreth
1300 N. 17th Street
11th Floor
Arlington, VA 22209

Randall B. Lowe, Esq.
Mary E. Brennan, Esq.
Jones, Day, Reavis & Pogue
Attys for Penn Access Corp.
1450 G Street, N.W.
Washington, D.C. 20005-2088

Spencer L. Perry, Jr.
Senior Director
External Affairs
P. O. Box 5090
Hoboken, NJ 07030

David C. Jatlow
Counsel for RGT Utilities,
Inc.
Young & Jatlow
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037

R. Michael Senkowski
Jeffrey S. Linder
Michael K. Baker
Wiley Rein & Fielding Assoc.
1776 K Street, N.W.
Washington, D.C. 20006

James D. Ellis
William J. Free
Paula J. Fulks
Southwestern Bell Corporation
175 E. Houston, Room 1218
San Antonio, TX 78205
Stuart Dolgin, Esq.

William B. Barfield
Richard M. Sbaratta
Rebecca M. Lough
BellSouth Telecommunications,
Inc.
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30367-6000
Swidler & Berlin, Chartered

Martin T. McCue
General Counsel
Linda Kent
Associate General Counsel
United States Telephone Assoc.
900 19th Street, NW, Suite 800
Washington, D.C. 20006-2105
1255 23rd Street, N.W.

James S. Blaszk
Patrick J. Whittle
Gardner, Carton & Douglas
Attys for Ad Hoc Telecommuni-
cations Users Committee
1301 K Street, N.W.
Suite 900 East
Washington, D.C. 20005

Anne P. Jones
David A. Gross
Sutherland, Asbill & Grennan
Attys for Pactel Corporation
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Howard Monderer

Brian D. Kidney
Pamela J. Riley
Pactel Corporation
2999 Oak Road, MS 1050
Walnut Creek, CA 94569

Kathy L. Shobert
Director, Federal Regulatory
Affairs
888 16th Street, N.W.
Suite 600
Washington, D.C. 20006

House Counsel
Local Area Telecommunications,
Inc.
17 Battery Place
Suite 1200
New York, NY 10004

Catherine Wang, Esq.
Counsel for Local Area
Telecommunications, Inc.
3000 K Street, N.W.
Washington, D.C. 20007

Brian R. Moir
Fisher, Wayland, Cooper &
Leader
International Communications
Assoc.
Suite 800
Washington, D.C. 20037-1170

Randolph J. May
Richard S. Whitt
Sutherland, Asbill & Brennan
Attys for Capital Cities/ABC,
Inc.
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Sam Antar
Capital Cities/ABC, Inc.
77 West 66th Street
New York, NY 10023

National Broadcasting Company,
Inc.
Suite 930, North Office Bldg.
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Heather Burnett Gold
President
Association for Local
Telecommunication Services
1150 Connecticut Avenue, N.W.
Suite 1050
Washington, D.C. 20036

Francine J. Berry
R. Steven Davis
Roy E. Hoffinger
American Telephone &
Telegraph Co.
295 North Maple Avenue
Basking Ridge, NJ 07920

Kenneth Robinson
Attorney
Lafayette Center
P. O. Box 57-455
Washington, D.C. 20036

Francine J. Berry
Robert J. McKee
Richard H. Rubin
AT&T
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

Albert H. Kramer
Robert F. Aldrich
Keck, Mahin & Cate
Attys for American Public
Communications Council
1201 New York Avenue, N.W.
Penthouse Suite
Washington, D.C. 20005-3919

W. Bruce Hanks
President
Century Cellunet, Inc.
100 Century Park Avenue
Monroe, LA 71203

Robert W. Helay, Esq.
Smithwick & Belemdiuk, P.C.
Attys for Telecom Services
Group, Inc.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036

Ellen S. Deutsch
Senior Counsel
Electric Lightwave, Inc.
8100 N.E. Parkway Drive
Suite 200
Vancouver, WA 98662

Joseph P. Markoski
Andrew W. Cohen
Squire, Sanders & Dempsey
Attys for Information
Technology
Association of America
1201 Pennsylvania Avenue, N.W.
P. O. Box 407
Washington, D.C. 20044

Bryan Cave
Carl W. Northrup
PacTel Paging
Arch Communications Group,
Inc.
AACS Communications, Inc.
Centrapage, Inc.
Crowley Cellular
Telecommunications, Inc.
Kelley's Tele-Communications
Nunn's Communications
Services, Inc.
Radio Electronic Products
Corp.
Suite 700
700 13th Street, N.W.
Washington, D.C. 20005

Scott K. Morris
Vice President, Law
McCaw Cellular Communications,
Inc.
5400 Carillon Point
Kirkland, Washington 98033

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications,
Inc.
1250 Connecticut Avenue, N.W.
Suite 401
Washington, D.C. 20036

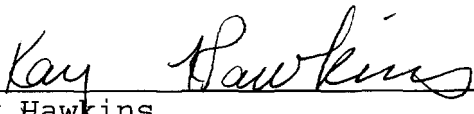
Thomas A. Stroup
Mark Golden
Telocator
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036

Doris S. Freedman, Esq.
Acting Chief Counsel
Barry Pineless, Esq.
Assistant Chief Counsel
Office of Advocacy
United States Small Business
Administration
409 3rd Street, S.W.
Washington, D.C. 20554

Steven J. Hogan
President
LinkUSA Corporation
230 Second Street, S.E.
Suite 400
Cedar Rapids, Iowa 52401

Martin W. Bercovici
Keller & Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001

Michael J. Shortley, III
RCI Long Distance, Inc.
180 South Clinton Avenue
Rochester, NY 14646


Kay Hawkins